E
458
.8
G7
X

GOOLD

BANCROFT
LIBRARY

THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA

Folsom

Hon. Milton S. Latham
with compliments of
John W. Dwinelle

UNITED STATES OF AMERICA.

Department of the Pacific before a Military Commission,

AT SAN FRANCISCO, CALIFORNIA.

THE UNITED STATES

vs.

T. E. HOOG ET AL.

ARGUMENT OF MR. EDMOND L. GOOLD, AND MR. JOHN W. DWINELLE, FOR THE DEFENDANTS.

EDMOND L. GOOLD,
JOHN W. DWINELLE,
Of Counsel.

Towne & Bacon, Printers.

The Bancroft Library

No. 4461.

21687B
THE BANCROFT LIBRARY

BANCROFT LIBRARY

UNITED STATES OF AMERICA.

DEPARTMENT OF THE PACIFIC — BEFORE A MILITARY COMMISSION.

THE UNITED STATES

against

T. E. HOGG ET AL.

ARGUMENT OF MR. EDMOND L. GOOLD AND MR. JOHN W. DWINELLE FOR THE DEFENDANTS.

STATEMENT OF THE CASE.

THIS Commission was detailed by Major General McDOWELL, commanding the Department of the Pacific, and the defendants arraigned before it, upon the "charge of a violation of the laws and usage of civilized "war," which charge, and the specification accompanying it, are to be found at page 7, of this argument. The substantial facts are briefly these: On the tenth day of November, 1864, the defendants were arrested on board the United States merchant steamer *Salvador*,

E458
.8
G7
X

THE BANCROFT LIBRARY

by the officers of the United States war steamer *Lancaster*. The officers of the war steamer *Lancaster* had previous knowledge that the defendants had come on board the *Salvador*, in the port of Panama, in the disguise of passengers, with the intent to rise upon the officers and crew when she should have reached the high seas, to capture her, and to convert her into a cruiser, in the service of the Government of the so-called Confederate States. The officers of the war steamer *Lancaster* permitted the defendants to go to sea peaceably, on the *Salvador*, but when the high seas were attained, arrested them. In their possession were found small arms adequate and proper for the contemplated rising upon the officers and crew, and the "Confederate" flag. Also the following

INSTRUCTIONS.

[DUPLICATE.] CONFEDERATE STATES OF AMERICA, Navy Department, Richmond, May 7th, 1864.

Acting Master T. E. Hogg, C. S. Navy, Richmond, Va.:

You will proceed with the men under your command from Wilmington, by the shortest and safest route, to the port of Panama. And at that port you will take passage on board either the *Guatamala* or *San Salvador*, the two Federal ocean steamers trading between Panama and Realejo. After reaching the high sea you will consider upon and devise a means to capture the vessel, in the name of the Confederate States, and effect the capture without fail. Your conduct towards the people of the captured vessel will be guided by that humanity which ever characterizes the conduct of our Naval officers.

Having secured the steamer, organized your crew, and hoisted the flag of the Confederate States, you will adopt prompt measures to arm your vessel and proceed to cruise against the enemy in the Pacific.

If practicable, you will report to, or communicate with, Captain Semmes, of the C. S. ship *Alabama*, and obey such orders as he may give you. The rights

of neutrals must be strictly regarded. The importance of establishing and maintaining a wholesome moral discipline is enjoined upon yourself and your officers.

Should you seek neutral ports for supplies, or otherwise, you will be careful to observe the usual naval courtesies and customs towards those in authority; and upon all proper occasions you will seek to place the character of the contest in which we are engaged, and the principles involved, in their proper light.

Should you at any time hesitate as to your course as a Confederate cruiser, your judgment may be governed by the consideration that you are to do the enemy, in accordance with the rules of civilized war, the greatest harm in the shortest time; and you will enforce upon your officers and men the performance of their duty in that spirit of humanity which ever distinguishes an American soldier.

You will endeavor to strike a blow at the California trade and whalemen in the Pacific; and should you capture bullion, it is suggested that, if no better means of shipping it to Europe offers, you place it in the hands of a British merchant of established character, at Valparaiso. A French man-of-war might receive it on freight for France.

At your request Acting Master F. M. Harris is ordered to report to you for duty in this enterprise.

I am respectfully, your obedient servant,

S. R. MALLORY,
Secretary of the Navy.

P. S.—You will ship your men regularly in the service of the Navy, in the usual manner, and are authorized to make such acting appointments of officers as your ship may require, reporting their names, and in all cases the evidences of their fitness and character to the department.

S. R. MALLORY,
Secretary of the Navy.

Also, to which were appended the names of all the defendants, the following

OATH TO THE CONFEDERATE GOVERNMENT.

I do solemnly swear, before Almighty God, and by all that I hold dear on earth, that I will bear true faith in the matter about to be laid before me, con-

cerning injury to be inflicted upon the merchant marine of the United States, and acting under orders of Acting Master T. E. Hogg, of the Confederate States Navy, that wherever I may be sent strict secrecy will be observed, and my actions so governed as to be free from suspicion. Should I wilfully, at any time or place, seek to damage the secrecy of the enterprize, or divulge anything that would damage the person or liberty of any one engaged in the enterprize, I hereby adjudge myself guilty of a flagrant breach of trust, and a violator of my oath, and as such justly merit any punishment that my associates in this matter may adjudge. This I solemnly swear, so help me God.

ARGUMENT.

May it Please the Commission—

The undersigned, of counsel for the prisoners, upon entering into the consideration of the defence which they propose to offer in behalf of their clients, feel bound to disembarrass themselves of some incidents which would otherwise restrain the proper freedom which belongs of right to their present position. They felt themselves bound, on Tuesday last, to present to the Commission a paper which the Commission declined to receive, or to enter upon the record, and returned it to counsel with, as we understood, an implied rebuke. This paper was prepared and presented with all possible respect to the Commission, both collectively and to its members individually, and as a part of the legitimate defence of the prisoners, which these counsel felt themselves bound to undertake, and to prosecute to the best of their ability; for although the prisoners have been detained upon suspicion of alleged crimes which are revolting to the patriotism of all loyal men, and are also abhorrent to human nature, and have

themselves, down to this very day, been publicly stigmatized as "Pirates," the undersigned would have felt themselves false to their oaths as lawyers, false to their profession, and false to the cause of humanity, if, being appealed to as lawyers, they had not consented to appear for these prisoners, and to conduct that defence which the prisoners had a right to make, as well as it could be conducted. The undersigned did not need the example of Denman, or of Brougham, to enforce upon them the ethics, not merely of the bar, but of public law and of humanity, which are thus expressed in the vigorous language of Lord Erskine, defining the rights of all accused persons, as well as those of Englishmen:

"I will forever, at all hazards, assert the dignity, "independence, and integrity of the English Bar, with- "out which impartial justice, the most valuable part "of the English Constitution, can have no existence. "From the moment that any advocate can be permitted "to say that he *will*, or will *not*, stand between the "Crown and the subject arraigned in the Court where "he daily sits to practice, from that moment the liber- "ties of England are at an end. If the advocate refuse "to defend from what *he may think* of the charge, or of "the defense, he assumes the character of the Judge; "nay, he assumes it before the hour of judgment; and, "in proportion to his rank and reputation, puts the "heavy influence of perhaps a mistaken opinion into "the scale against the accused, in whose favor the be- "nevolent principle of the English Law makes all pre-

"sumptions, and which commands the very Judge to "be his counsel."

Acting under the sense of these high responsibilities, considering themselves infamous, if, being appealed to, they did not undertake the defence in such a manner as to secure to their clients every possible advantage which the forms of procedure guaranteed to them, the undersigned have given to the defence the best of their judgment, and, when they doubted, have taken that course which would most effectually secure to the prisoners the benefit of that doubt. Hence arose the preparation and submission of the paper presented on Tuesday, which the Commission declined to receive. If that paper has any significance, as one of the documents in this proceeding, it will receive its proper consideration. If it has no significance, it will receive no weight. In either event it was prepared and submitted with the greatest regard for the interest of the prisoners, and with an equal respect for the Commission.

In proceeding to the discussion of the charge made against the prisoners, the undersigned respectfully submit that there is no charge of any offence alleged to have been committed by any of them. In other words, that the specification does not sustain the charge ; and before proceeding further they wish to call the attention of the Commission to the fact that, in all the citations made by them, the *italics* are theirs, and are introduced for the sake of emphasis.

The following are the charge and specification on which the trial is based.

"CHARGE.

"Violation of the laws and usage of civilized war.

"SPECIFICATION.

"In this, that they, the said T. E. Hogg, E. A. Swain, J. S. Hiddle, W. L. Black, T. J. Grady, R. B. Lyon, and Joseph Higgins, being commissioned, enlisted, enrolled, or engaged by the Government of the so-called Confederate States, did, on or about the tenth day of November, 1864, come on board of the U. S. merchant ship *Salvador*, then lying in the friendly port of Panama, New Granada, in the guise of peaceful passengers, without any visible mark or insignia indicating their true character as enemies, and did so enter on board of said steamer, secretly armed, and provided with manacles, with the intention, purpose, and object of treacherously rising on the Master, crew, and unsuspecting passengers of said steamer, when she had reached the high seas, and of capturing her and the property aboard, and of converting her into a cruiser to prey on the commerce of the citizens of the United States."

It will be observed that the prisoners are not charged with any offence committed by them *as citizens of the United States*. There is neither allegation nor proof that they are such citizens; but, on the contrary, both charge and proofs give them the *status of belligerents* in the service of the "Government" of the so-called Confederate States. The charge is simply a "violation of the laws and usage of civilized war." We

submit that this charge is not sustained, even if the specification is proved.

In discussing this point, it is to be remarked, that the character of the punishment annexed to an act of war has no force whatever in determining whether the act itself is or is not a "violation of the laws and usage "of civilized war." For example, the office of a spy is an infamous one, and is punished by a speedy, disgraceful, and violent death; and, for this reason, a commanding officer has no right to compel a soldier to become a spy. But a person who performs this office of spy does not "violate the laws and usage of civilized "war." Says Gen. Halleck, in his Treatise on International Law, which is accepted by the Supreme Court of the United States as the most serviceable treatise on this topic: "The employment of spies is considered a "kind of clandestine practice, a deceit in war, *allowable* "*by its rules.*" Halleck, page 406, section 26. This extreme case illustrates completely our proposition. Therefore, neither the infamy attached to an act of war, nor the nature of the punishment awarded to it, can assist us in determining whether the act itself is or is not a "violation of the laws and usage of civilized war."

The offence charged is not *piracy*, for piracy is robbery, or a forcible depredation on the *high seas*, without lawful authority, done with the intent of robbery, in the spirit and intention of universal hostility. Bouvier's Law Dic., title "Piracy;" United States vs. Klintock, 5 Wheaton, 153, 163; United States vs.

Palmer, 3 Wheaton, 631; United States vs. Jones, 3 Washington's Circuit Court Reports, 209.

This is also the definition of piracy by the Law of Nations. 1 Kent's Commentaries, 183. So that, although the prisoners have been popularly called "pirates," and some of the witnesses have even given them that name, still there is not a single act charged against them which partakes of a piratical character. *The very charge itself distinguishes the Port of Panama as not being a part of the high seas*, as it alleges that they did not intend to consummate their crime until they had left the Port of Panama and "*had reached the high seas*," and so it must be taken for granted that the Port of Panama is not a part of the high seas.

The letters of the Consuls at Panama and Havana, addressed to the Department of State, touching the *intentions* of the prisoners, frequently speaks of them as "PIRATES."

This correspondence was vainly objected to by the prisoners as not binding on them, being communications between third persons, to which the prisoners were not parties, and for the contents of which no just man ought to hold them responsible. And the prisoners respectfully suggest that as the object of this trial is at last to get at the truth, meaning the truth as ascertained by the civil law, by moral law, and by martial law combined, and to enforce its consequences, be they what they may, the purposes of the investigation would not be promoted by the loose and indiscriminate use of opprobrious epithets.

The board, however, having permitted these letters to be read in evidence, the prisoners will content themselves with answering the denunciations of their being guilty of the diabolical crime of piracy, and with commenting upon the looseness and carelessness with which that odious term is frequently employed, by quoting the language of Mr. Webster, the then Secretary of State, addressed to Mr. Fox, the British Ambassador, in McLeod's case in the matter of the Canadian rebellion in 1837:

"Her Majesty's Government are pleased also to "speak of those American citizens who took part with "persons in Canada, engaged in an insurrection against "the British Government, as 'American pirates.' The "undersigned does not admit the propriety or justice "of this designation. If citizens of the United States "fitted out, or were engaged in fitting out, a military "expedition from the United States, intended to act "against the British Government in Canada, they were "clearly violating the laws of their own country, and "exposing themselves to the just consequences which "might be inflicted on them if taken within the British "dominions. But, notwithstanding this, they were "certainly not pirates, nor does the undersigned think "that it can advance the purpose of fair and friendly "discussion, or hasten the accommodation of national "difficulties, so to denominate them. Their offense, "whatever it was, had no analogy to cases of piracy. "*Supposing all that is alleged against them were true, they* "*were taking a part in what they regarded as a civil war,*

"*and they were taking a part on the side of the rebels.* "Surely England herself has not regarded persons thus "engaged as deserving the appellation which Her Maj- "esty's Government bestows on these citizens of the "United States."

"But whether the revolt be recent or long-contin- "ued, they who join those concerned in it, whatever "may be their offense against their own country, or "however they may be treated, if taken with arms in "their hands in the territory of the government against "which the standard of revolt is raised, cannot be "denominated pirates without departing from all ordi- "nary use of language in the definition of offenses. A "cause which has so foul an origin as piracy can not, "in its progress or by its success, obtain a claim to any "degree of respectability or tolerance among nations; "and civil wars, therefore, are not understood to have "such a commencement." Webster's Diplomatic and Official Papers, pp. 128, 129.

What, then, is the character of the act charged against these prisoners, as recognized by the laws of war? We reply, it was a *stratagem in war, perfectly allowable under the laws and usage of civilized war.* Says General Halleck, in his Treatise on International Law, page 402, Sec. 23: "Stratagems in war are snares laid "for an enemy, or deceptions practiced on him without "perfidy, and consistent with good faith. They are "not only allowable, but have often constituted a great "share of the glory of the most celebrated command-

"ers. 'Since humanity obliges us,' says Vattel, 'to "prefer the gentlest methods in the prosecution of our "rights, if, by a stratagem, by a feint devoid of perfidy, "we can make ourselves masters of a strong place, sur- "prise the enemy, and overcome him, it is much better, "and is really more commendable to succeed in this "way than by a bloody seige or the carnage of a bat- "tle.

"Thus, feints and pretended attacks are frequently "resorted to, *and men or ships are sometimes so dis- "guised as to deceive the enemy as to their real character, "and, by this means, enter a place or obtain a position "advantageous to their plan of attack or of battle.*' But "the use of stratagems is limited by the rights of hu- "manity and the established usages of war. Even if "devoid of perfidy, and consistent with the faith due "the enemy, they must not violate commercial usage, "or contravene the stipulations of particular treaties. "Vattel mentions the case of an English frigate which, "in the war of 1756, is said to have appeared off Cal- "ais, and made signals of distress, with a view of de- "coying out some vessel, and actually seized a boat "and some sailors who generously came to her assist- "ance. If the fact be true, that unworthy stratagem "deserves a severe punishment. It tends to dampen a "benevolent charity, which should be held sacred in "the eyes of mankind, and which is so laudable even "between enemies. Moreover, making signals of dis- "tress is asking for assistance, and by that very action "promising perfect security to those who give the

"friendly succor. Therefore the action attributed to "that frigate implies an odious perfidy. Ortolan refers "to the conduct of an English frigate and two vessels "at Barcelona, in 1800, as of the same character as "that of the English frigate off Calais, described as "above by Vattel. On the fourth of September, 1800, "the English took forcible possession of a Swedish ves- "sel, then neutral, near Barcelona, put a large number "of English soldiers and marines on board, and, enter- "ing the harbor in the night, under this neutral flag, "and in a neutral vessel, surprised and captured two "Spanish frigates which were lying at anchor. Ortolan "denounces this as an act of perfidy, and as not being "a stratagem allowable by the usages of war. This act "may be viewed in different lights. *So far as the sur-* "*prise of the Spaniards is concerned it was a legitimate* "*stratagem. It was their duty to be prepared for such an* "*attack, and they were properly punished for their neglect* "*to take the proper and ordinary precautions to prevent it.* "So far as the seizure and the use of the Swedish ves- "sel, and the treatment received by its Captain and "crew at the hands of the English, are concerned, it "was a gross violation of neutral rights, which would "have justified Sweden in declaring war, on satisfaction "being refused. As between Spain and Sweden it was "a gross neglect of neutral duty, on the part of the lat- "ter, in not requiring England to restore the captures "thus unlawfully made under the Swedish flag. *With* "*respect to the* ACTUAL ATTACK *made by the English under* "*a false flag*, it was a direct violation of their own mar-

"itime laws, and the established usages of nations, as "will be shown in the next paragraph."

We have cited this whole section because it not only gives the true rule, but also because its illustrations embrace the very case now before the Commission. It is *allowable* to go on board an enemy's ship in the guise of passengers, with the *intent* of rising upon the officers and ship, and capturing them *as an act of war*. And this secresy and disguise may be maintained until the very moment of the *actual attack*, and not until then is it necessary to disclose the flag under which the act is committed. Here the prisoners had what the charge itself denominates the "confederate" flag in their possession, and it is to be presumed that they intended to raise it when they should rise upon the officers and crew.

At any rate they committed no offence, for they made no attack, and until that act it was not necessary to show their flag. Section 23, page 401, of the same work of General Halleck's fully defines what is meant by perfidy and good faith:

"War makes men public enemies, but it leaves in "force all duties which are not necessarily suspended "by the new position in which men are placed toward "each other. Good faith is, therefore, as essential in "war as in peace, for without it hostilities could not be "terminated with any degree of safety, short of the "total destruction of one of the contending parties. "This being admitted as a general principle, the ques- "tion arises, how far we may deceive an enemy, and

"what stratagems are allowable in war? Whenever "we have expressly or tacitly engaged to speak truth "to an enemy, it would be perfidy in us to deceive his "confidence in our sincerity. But if the occasion im- "poses upon us no moral obligation to disclose to him "the truth, we are perfectly justifiable in leading him "into error, either by words or actions. *Feints, and "deceptions of this kind, are always allowable in war.* It "is the breach of good faith, express or implied, which "constitutes perfidy, and gives to such acts the charac- "ter of *lies.*" Halleck on Int. Law, pages 401, 402, section 22.

Perfidy or treachery, then, consists in committing an act of war which we have either tacitly or expressly agreed not to commit. It is perfidy or treachery to violate a safe conduct. It is perfidy or treachery to fire at a flag of truce, or to fire from under it. It is perfidy or treachery to make an assault without disclosing the flag under whose authority it is made. But it is not perfidy or treachery to go on board a ship in the guise of peaceful passengers, with the intention of rising upon and capturing the crew and ship as an act of war. For the belligerents in this case made no pledge, bound themselves by no flag of truce, held out no flag, false or true, and in their capacity of belligerents were under no moral obligation making it possible for them to become perfidious. To quote the same author:

"*So far as the surprise of the Spaniards is concerned, "it was a legitimate stratagem. It was their duty to be "prepared for such an attack, and they were properly pun-*

"*ished for their neglect to take the proper precautions to* "*prevent it.*" Halleck's International Law, page 403, section 23.

Both of our propositions are strongly confirmed by General Order, No. 101, of April 24, 1863, which reads as follows:

"101. While deception in war is admitted as a "just and necessary means of hostility, and is consistent "with honorable warfare, the common law of war "allows even capital punishment for clandestine or "*treacherous* attempts to injure an enemy, because they "are so dangerous, and it is so difficult to guard "against them."

And No. 19, of the same General Orders, avows that "surprise may be a necessity."

It follows, then, from the very orders of war:

First. That deception in warfare is a just and necessary means of hostility, and is consistent with honorable warfare.

Secondly. That it is only *treacherous* attempts to injure an enemy which will be visited with capital punishment; and what constitutes such treachery we have just demonstrated.

Thirdly. That the nature of the punishment awarded to an act of war has no force or effect whatever in determining the character of that act, in reference to its being a "violation of the laws and usage of civilized war."

These General Orders are therefore consistent with "the laws and usage of civilized war," as laid down by

our own writers, and generally practiced before the recent rebellion. And, if it were otherwise, we need not say that no State can, by its own sole act, alter "the laws and usage of civilized war" in any respect. In effect, these General Orders do not purport to be anything more than a codification of preëxisting rules, nor could they, in any event, obtain any higher character.

Therefore it follows that, even if the prisoners have committed an offence, it is not the offence with which they are charged. They have not committed a "viola-"tion of the laws and usage of civilized war."

The foregoing assumes that the prisoners did really commit an overt act of war. The going on board a merchant vessel, not on the high seas, and not within the jurisdiction of the United States, with the intent mentioned in the specification is not a warlike act. The act might be punishable by the laws of New Granada, but it is no infraction of the laws of war. For there could be no war between the belligerents within the jurisdiction of a foreign power. If persons in the service of the enemies of the United States should go on board a vessel in a Chinese harbor, with the intent of taking her either there, or beyond a marine league from the shore, that would constitute no offence against the laws of nations or against any law of the United States. The most that can be said is, that the prisoners harbored the alleged *intent*, in going on board. But that *intent* became extinct before they reached the ocean. They did not go to sea voluntarily. *One of the belliger-*

ents put an end to the expedition in a place in which no war between them could exist.

The prisoners were captives, and a captive cannot hope to be a conqueror. All hope of continuing the enterprize must have been totally extinguished when the prisoners became captives in the Bay of Panama. Therefore the prisoners were not on the high seas with any hostile intent touching either the *Salvador* or any other vessel. The prisoners did not embark on the *Salvador* intending *then and there* to take her, nor are they charged with having done so. On the contrary, they intended not to capture her within the harbor, but go with her under the directions of her commander, outside the port, and this in the most peaceful manner. The officers of the *Lancaster* seem to have understood this, for they had a force sufficient to capture the prisoners in the streets of Panama, and yet no attempt to capture them there was made. The right, however, to make such capture existed as completely in the city as on board the ship, inasmuch as it existed in neither place. It is idle to pretend that the prisoners were not captives on board the *Salvador*. Their baggage was taken from them *instanter*. All their arms and ammunitions of war were among their baggage. The expedition was *really* to commence when the *Salvador* should arrive outside. Unarmed, and at the mercy of surrounding bayonets, what madness for them to think of commencing the expedition! They must have given it up. They surrendered their *intention*. It was actually

driven out of the minds of each and all of them before they had an opportunity to do any body any harm, and long before the happening of the event that was to precede their doing an act of war, viz.: *their arrival on the high seas.* The expedition was abandoned. The reasons for its abandonment are wholly immaterial. If the officers of the *Lancaster* had given them permission to go ashore from the *Salvador*, they would not be here in irons to-day. They became peaceful, in a foreign country, *forcibly* peaceful, if it must be said, and in a place in which, for offences, intended or committed, no other country can administer any description of punishment. Their intention died in the Bay of Panama, where the United States has no jurisdiction, and no similar intention has been, or is likely now again to be justly imputed to them. A bad intent is not punishable as a crime. The intent must be accompanied by some *overt* act appropriate to its accomplishment, and both must exist within the jurisdiction of the authority that proposes to punish. If it be said that the going on board the *Salvador* was such an act, the answer is, that if the offence had thus become complete, it was committed where the Government of the United States has no jurisdiction.

BANCROFT LIBRARY

If the prisoners had gone on board a vessel in one of the ports of the United States with the intent mentioned, and had there, or within the seas of the United States, committed any overt act in the furtherance of that intent, they might (if not considered belligerents)

have possibly been held under the Act of Congress of April 30th, 1790, enlarging the definition of piracy, as understood in the laws of nations. See United States Statutes at Large, Vol. I, page 113, § 8. But that Act of Congress enlarges the definition of piracy only as a *municipal* offence within the jurisdiction of the United States, and does not affect the definition or crime of piracy under the law of nations, and therefore has no effect upon the "laws of usage or civilized war." See In re Turnan, Queen's Bench, May, 1863, 26 Law Reporter, 499, etc. But that supposed case is not the case actually on trial. Here is an attributed *intention* not carried into actual accomplishment, and therefore destitute of the overt act by which a mere intention ripens into a crime. But a bare intention to commit an offence, without any overt act towards its commission, is not a crime or offence for which the party can be held liable. Bouvier's Law Dic., title "Intention," 5. So even where a party has conceived the *intention* to commit a crime, he has a *locus pœnitentiæ*, which literally signifies a place of, or a time for, repentance, which, in reference to projected crimes, is the opportunity of abandoning the intention of committing a crime before the opportunity for its completion. Bouvier's Law Dic., title "Locus Pœnitentiæ." And, therefore, a mere attempt to commit a crime, even if carried beyond mere preparation, but falling short of execution of the ultimate design, is not characterized with the heinousness of the intended offence. A man who buys poison

for the purpose of committing a murder, and mixes it in the food intended for his victim, will or will not be guilty of an attempt to poison, from the simple circumstance of his taking back the poisoned food before or after the victim has an opportunity to take it: for if, immediately on putting it down, he should take it up, and, awakened to a just consideration of the enormity of the crime, should destroy it, this would amount only to preparations; and certainly, if, before he placed the poison on the table, or before he mixed it with the food, he had repented of his intention, there would have been no attempt to commit a crime. The law gives this as a *locus pœnitentiæ*. Bouvier's Law Dic., title "Attempt."

Now the Law Civil and the Law Martial do not differ in their definitions. They differ only in their modes of procedure. We have, therefore, cited definitions from elementary works acknowledged as authority by both systems.

From these definitions alone, which enter into the very essence of crimes, it appears that a mere *intent* not carried into any *overt act of execution* manifested by open action, does not constitute the offence intended to be committed. And in this case there was manifestly an abandonment of the intent to proceed any further. The *locus pœnitentiæ* is allowed to qualms of conscience and to prevailing fears, only because they interrupt the proceeding from *intention* to *action*. Why, then, should it not be allowed to that absolute interruption which arises from detection and the presence of a superior hos-

tile force? If a person were arrested outside of your military lines, but proceeding towards them with the *intention* of entering them as a spy, would you try, convict and hang him for the *intention* of entering your lines as a spy?

EDMOND L. GOOLD,
JOHN W. DWINELLE,
Of Counsel, etc.